IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 981 OF 2004.

1. Smt.Mangal Balasaheb Jagtap,

2. Shri Hemant Balasaheb Jagtap,

3. Sou Supriya Rajendra Bhagat,

4. Deepanjali Prashant Tamhane,

5. Sou Roopali Rajendra Tembare. ... Appellants.

V/s.

1. Sou Suman Vitthalrao Borate,

2. Sou SBaby Prabhakar Inamke,

3. Sou Jayashree Vivek Darode,

4. Sou Vaijayanti Anil Dangmali,

5. Shri Arun Raghunath Jagtap,

6. Smt. Swati Mukund Jagtap,

7. Shri Rahul Mukund Jagtap,

8. Kum Manisha Mukund Jagtap. ... Respondents.

R.S.Apte i/b. N.R.Bubna for the appellants.

Tejas D. Deshmukh for respondent Nos.1, 2 and 4.

CORAM : **S.B. MHASE AND**
R.S. MOHITE, JJ.

DATED : **26th October 2004.**

ORAL JUDGMENT : (Per S.B.Mhase, J.)

. This appeal is directed against the judgment and decree passed in Special Civil Suit No.1891 of 1998 by the Fifth Additional Judge, Small

Causes Court and Joint Civil Judge, Senior Division, Pune on 24th June, 2004. The present appellants are the original defendant Nos.2 to 6. Respondent Nos.1 to 5 are original plaintiffs, respondent No.5 is original defendant No.1 and respondent Nos.6 to 8 are original defendant Nos.7 to 9.

2. Respondent Nos.1 to 4 herein filed Special Civil Suit No.1891 of 1998 seeking partition and possession of the suit property i.e. house property No.10/11 A,B,C admeasuring 17,325 sq.ft. which is a part of City Survey No.11/A admeasuring 3 acre and 27.4 R. situated at Gultekadi within the limits of Municipal Corporation of Pune. During the pendency of the suit, in view of the objection raised by the appellants, two other properties were included in the suit. Those are the properties, namely, City Survey No.1089, Shukrawar Peth, Pune admeasuring about 4,200 sq.ft., located on the ground floor as tenanted premises & Gat No.465/1B/1 situated at mouje Saswad. In lieu of the property CTS No.1089, after development, the property has been allotted to respondent No.2 and 5. However, plaintiff No.2 (Respondent No.2) claimed that since the property has changed its nature the others i.e appellants and Resp.No.1 and 6 to 8 have no share in this property. The other property is land

admeasuring 0.80 R out of Gat No.465/1B/1 totally admeasuring 3 H. and 66 R. situated at Mouje Saswad, Pune which presently stands in the name of defendant No.3. However, it is stated that respondent Nos.1 to 4 do not desire to have share in the said property. Thus, what is to be noted here that all the properties of the family of the appellants and the respondents have been brought to a common hotch-pot. However, the plaintiffs have given up their shares in the property admeasuring 0.80 R situated at Saswad, which is standing in the name of defendant No.3, and so far as property described in plaint para-1 i.e. a tenanted property which was subsequently developed and is in possession of respondent No.2, situated at Shukrawar Peth, Pune being City Survey No.1089, the contention of respondent No.2 is that the said property is not liable for partition. Therefore, the fact remains that ultimately respondent Nos.1 to 4 i.e. original plaintiffs are only claiming share in the house property No.10/11 ABC admeasuring 17,325 sq.ft. out of City Survey No.11/A admeasuring 3 acre and 27.4 R. situated at Gultekdi.

3. According to the plaintiffs, the suit properties were the properties of one Raghunath who was father of the plaintiffs. Raghunath expired on 23rd

May, 1987. His wife Venubai had expired in 1979. Raghunath and Venubai were having three sons, namely, Arun (respondent No.5), Balasaheb and Mukund and four daughters, namely, respondents Nos.1 to 4 i.e. Suman, Baby, Jayashree and Vaijayanti. Out of three sons of Raghunath, two sons, namely, Balasaheb and Mukund have expired on 25th April, 1986 and 12th March, 1995 respectively. The present appellants, who are original defendant Nos.2 to 6, are the heirs of deceased Balasaheb while respondent Nos.6, 7 and 8 (original defendant Nos.7, 8 and 9) are the heirs of deceased Mukund. The original defendant No.1, who is respondent No.5 herein and who is one of the sons of Raghunath, is alive. According to the plaintiffs, the suit properties were the self-acquired properties of deceased Raghunath and, therefore, each of the plaintiffs is having 1/7th share in the suit properties which they have inherited after the death of Raghunath. According to the plaintiffs, respondent No.5 is having 1/7th share. The appellants/ original defendant Nos.2 to 6 together have 1/7th share and respondent Nos.6,7 and 8 (original defendant Nos.7, 8 and 9) together have 1/7th share and, thus, respondent Nos.1 to 4 (original plaintiffs) have claimed partition in respect of the suit properties.

4. Respondent No.5, who is original defendant No.1 has not contested the suit and has not even filed his written statement and, therefore, suit proceeded exparte against respondent No.5. The suit was contested by the appellants (original defendant Nos.2 to 6) and respondent Nos.6 to 8 (original defendant Nos.7 to 9), however, after the decree is passed in favour of respondent Nos.1 to 4, as stated above, it is only defendant Nos.2 to 6 i.e. the heirs of Balasaheb have challenged the said decree by filing present appeal. Heirs of Mukund i.e. respondent Nos.6 to 8 though served in this appeal are absent and have accepted the decree as a result of not challenging the same. Respondent No.5 though served in the appeal is absent and he was equally absent in the trial Court.

5. We have noticed that the matter is between the brothers and sisters and is pertaining to the shares in the properties. We have also noticed that the shares have been properly calculated and only dispute is regarding nature of the properties and the family arrangement. Therefore, with the consent of both sides we have decided to dispose of this appeal finally. Accordingly, we called for record and proceedings and by dispensing with the printing of paper book we proceeded to hear the appeal. The paper

book in this appeal has been prepared and submitted by respondent Nos.1 to 4.

6. In order to contest the claim of the plaintiffs, as stated hereinabove, written statement was filed by original defendant No.3 who is appellant No.2 herein. Appellant Nos.1, 3 and 4 and also respondent Nos.6, 7 and 8 have filed purshis in the trial Court adopting the written statement filed by original defendant No.3 - Hemant. In the written statement, we find that one of the objections is that plaintiffs' suit suffers from non-inclusion of the property being City Survey No.1089 situated at Shukrawar Peth (earlier City Survey No.567/2) and that therefore the suit is not tenable. During the trial of the suit it was further pointed out that one more property, namely, property situated at Saswad was also not included. However, as stated in the earlier paragraphs, these two non-included properties were later on included in the plaint in para Nos.1(a) and 1(b) and, thus, what we find is that all the properties of deceased Raghunath, which were liable for partition amongst appellants and respondents, were brought into common hotch-pot and, therefore, the objection which was initially raised was no more available to the appellants. Learned counsel for the appellants also

concedes that the said ground is now not available in view of inclusion of those properties in the plaint.

7. At this stage, we would like to refer to the purshis which has been filed by the appellants on 19th April, 2004 which is at Exh.54. Since these two properties were included during the pendency of the suit, by this purshis (Exh.54) defendant Nos.2 to 9 i.e. appellants and respondent Nos.6 to 8 informed the Court that in-spite of amendment carried out by plaintiffs, they do not want to file additional written statement and do not want to lead additional evidence. Therefore, the appellants not only gave up their right to file additional written statement but also gave up their right to lead evidence in respect of these newly added properties in paras- 1(a) and 1(b) of the plaint.

8. The other ground which was raised in the written statement was in respect of family arrangement. The appellants have contended in the written statement that property being City Survey No.1089, Shukrawar Peth, Khadkamal Aali was not included in the suit which was a tenanted property of deceased Raghunath where he was carrying out business of workshop. The said property is in possession of respondent No.2 and her husband, and they are carrying out business of repairs

of trucks in the said property. Therefore, the said property is not included in the suit. We observe at this stage that since these property was subsequently included in the plaint, we need not scan for the reason for non-inclusion of the said property in the plaint.

9. The appellants have further contended that there was oral family arrangement and as per the said family arrangement respondent No.5 was to carry out business in some part of the property. Accordingly, he started business in the property at Shukrawar Peth in the name of Arun Fuel Injection Services. So also husband of respondent No.2 is carrying out business of truck repairs in part of the said property and is taking income. Thus, the property situated at Shukrawar Peth being City Survey No.1089 is given to respondent No.2 and respondent No.5. It is further contended that as per the said family arrangement, the property described in plaint para-1 i.e. house property No.10/11 A,B,C was given to deceased Balasaheb i.e. from whom the appellants are claiming and deceased Mukund from whom respondent No.6 to 8 are claiming. As per the said family arrangement, appellants and respondent No.6 to 8 are carrying out their businesses in the said property and, therefore, according to the appellants, respondent Nos.1 to 4 and

respondent No.5 have no legal right to claim any share in the said property.

10. It is further averred in the written statement that on 16th September, 1986; 30th October, 1987; 3rd November, 1987 and 8th September, 1986, respondent Nos.1 to 4 have executed separate declarations before the Magistrate and relinquished their shares in the property in favour of appellants and respondent Nos.6 to 8 and since they have relinquished their shares they have no claim in the property.

11. In para-6 of the written statement, it was further averred that the suit properties were the ancestral properties of Raghunath and, therefore, the shares will have to be calculated as per section 6 of the Hindu Succession Act i.e. by carving out notional share of deceased Raghunath which will be available for giving shares to respondent Nos.1 to 4.

12. In para-7 of the written statement, it was averred that there was 70 Tolas gold and the said gold was partitioned by respondent Nos.1 to 4 after the death of Raghunath and they have relinquished their shares in the properties. Alternatively, it was

contended that even if it is assumed that respondent Nos.1 to 4 have share in the property, their share will be 20% and after keeping in mind the property being City Survey No.1089 situated at Shukrawar Peth, Pune that share of respondent Nos.1 to 4 and 5, which will be available in the suit property i.e. house property No.10/11 A,B,C, will be negligible and impartable and the partition cannot be effected.

13. From this written statement, what we find is that the appellants initially tried to put up the case of family arrangement. Secondly, they tried to put up the case that respondent Nos.1 to 4 have relinquished their shares in lieu of accepting partition of 70 Tolas gold by executing separate declarations before the Magistrate as stated hereinabove. Thirdly, they tried to put up the case of ancestral properties and tried to invoke provisions of section 6 of the Hindu Succession Act for notional partition and, alternatively, contended that the suit property i.e. house property No.10/11 A,B,C cannot be partitioned.

14. We have thoroughly gone through the pleadings. We have equally gone through the evidence in the matter. It is pertinent to note that Baby,

respondent No.2 and Jayashree, respondent No.3 have entered into witness box to prove the case of the plaintiffs. As against this, appellant and respondent Nos.6 to 8 have not examined themselves or any witness on their behalf. Therefore, except their written statement there is no evidence produced by the appellants and respondent Nos.6 to 8 in support of their contentions. However, we are aware that they can establish their case from the cross-examination of the plaintiffs' witnesses and, therefore, it is necessary for us to scrutinize the evidence of the plaintiffs.

15. Before entering into this area, we would like to mention that Raghunath died on 23rd May, 1987. However, from the written statement we find that two of the relinquishment deeds were dated 8th September, 1986 and 16th September, 1986. We find that these two declarations were not proved. Even assuming that they are proved, then also they cannot have any effect because they were executed during life time of Raghunath. Two declarations dated 30th October, 1987 and 3rd November, 1987, which are at Exh.24 and 25, have been executed by respondent Nos.2 and 3. However, from the contents of these documents what we find is that these two respondents have surrendered their shares in the said property and they have stated that

out of love and affection for the brothers they have given up their shares in the said property. Therefore these are the relinquishment deeds and as value involved therein is more than Rs.100/- these documents have to be compulsorily registered under section 17 of the Registration Act. Therefore these documents cannot be read in evidence. One more consideration we may mention, which casts doubt in mind is that names of respondent Nos.1 to 4 were entered into city survey record in the year 1997 and after due notice to the appellants and respondent Nos.6 to 8, mutation entry was certified. However, it was open for the appellants to place these declarations before the authorities so that entry in respect of names of respondent Nos.1 to 4 could not have effected in the city survey extracts. For the reasons best known to the appellants and respondent Nos.6 to 8, these documents were not pressed into service when the above mutation entry was effected in favour of respondent Nos.1 to 4. These documents are doubtful documents. Since we have already held that these documents are not admissible, we do not want to ponder on these documents any more.

16. Learned counsel for the appellants Mr.Apte submitted that even though the documents are not admissible for the purpose of showing relinquishment of

the shares as claimed in the said declarations, still those documents can be used for collateral purpose in view of provisions of section 49 of the Indian Registration Act. According to him, these documents can very well be used for collateral purpose of showing that there was a family arrangement between the parties to the suit as contended in the written statement and, therefore, Mr.Apte very much insisted for considering these documents for this collateral purpose i.e. to prove the existence of family arrangement. Learned counsel Mr.Apte further pointed out from the cross-examination of plaintiffs' witness - Baby that she has admitted declaration (Exh.24) and the contents therein. He has further pointed out admission from the cross-examination that respondent No.5 is having separate business after the death of father Raghunath and that plaintiffs and respondent No.5 are carrying out business in the premises located at Shukrawar Peth bearing City Survey No.1089 and that appellants and respondent Nos.6 to 8 have not objected for the said business. He has further pointed out admission that appellants and respondent Nos.6 to 8 are carrying out business in the suit premises i.e. house property No.10/11 A,B,C. From the statement of Jayashree at Exh.34 he has pointed out that Jayashree has accepted her signature on affidavit dated 3rd November, 1987

which is at Exh.25 and that plaintiff No.2 and her husband handed over property admeasuring 4,200 sq.ft. to the builder after the death of her father Raghunath. Further admission is pointed out that appellants and respondent Nos.6 to 8 are doing their business in the suit property i.e. house property and that after death of her father Raghunath, appellants and respondent Nos.6 to 8 never claimed any right or interest in the property located at Shukrawar Peth. It is further pointed out that neither respondent Nos.1 to 4 nor respondent No.5 ever objected the appellants and respondent Nos.6 to 8 for carrying out their businesses in the suit property. Thus, from this evidence learned counsel for the appellants submitted that the case made out by the appellants in the written statement, to the effect that the property at Shukrawar Peth is in possession of respondent No.2 and her husband and respondent No.5 and that the suit property i.e. house property No.10/11 A,B,C is in possession of the appellants and respondent Nos.6 to 8, has been proved and established. Thus, according to him, the appellants have proved family arrangement.

17. No doubt, we have found that the enjoyment of the properties has been accepted by the plaintiffs. However, it is not known when such arrangement was

arrived at between the parties. The written statement is silent on the point as to the date, time and year of the family arrangement which has been brought about between the parties. In absence of the entry of the appellants into witness box, we are at loss to know at what point of time such family arrangement was brought about by the parties. The pleadings are vague and suffer from lack of material particulars to be disclosed. Unless the material facts are reflected, the evidence to prove those facts cannot be considered. Learned counsel for the appellants vehemently tried to submit that conduct of the parties is relevant and the conduct of the parties shows that they have acted upon the family arrangement. We are afraid to accept this proposition.

18. Learned counsel for the appellants further tried to submit that the property at Shukrawar Peth was tried to be exclusively claimed by respondent No.2 in a suit filed by her being Regular Civil Suit No.427/2000 which was later on withdrawn by respondent No.2 and her husband. What is pertinent to note here that, even though reference to this suit has been made in the cross-examination of plaintiffs' witness, the statement, which was made by respondent No.2 in the said suit to the effect that said property exclusively

belongs to her and her husband, has not been controverted to the witness in view of provision of section 145 of the Evidence Act and thereby bringing on record contradiction and/or giving an opportunity to the witness to explain the statement made by her in the earlier proceedings. In the absence of any such efforts being made following provisions of section 145 of the Evidence Act, it is not possible for us to read such a statement and to take into consideration the said material as evidence in the present proceedings. It is further to be noted that it is a statement by one of the plaintiffs and it will not be binding as against respondent Nos.1, 3 and 4 i.e. rest of the plaintiffs.

19. Apart from that learned counsel for the appellants tried to submit that the declarations at Exh.24 and 25 may be taken in to consideration for collateral purpose to establish family arrangement. However, those declarations do not make any reference to 70 Tolas gold being given to respondent Nos.1 to 4. Those declarations further do not make any reference to the family arrangement which has been brought about amongst the parties at any point of time. Apart from that, even if the case as it is made out for family arrangement is to be taken into consideration, then it is reflected from the averments in the written

statement that the property at Shukrawar Peth i.e. City Survey No.1089 is given to respondent No.2 and her husband as also respondent No.5 and the property situated at Gultekdi, Pune i.e. house property No.10/11 A,B,C is given to the appellants and respondent Nos.6 to 8. However, nothing is given to respondent Nos.1, 3 and 4 in the said family arrangement. It is an admitted position that respondent Nos.1, 3 and 4 have shares in the said properties which they have inherited from their deceased father. Therefore, if at all there was any family arrangement, then they would have naturally got some share in the properties for their enjoyment. As no shares in the properties have been given to respondent Nos.1, 3 and 4, what we find that there is no fair and equitable family arrangement brought about amongst the members of the family.

20. Learned counsel Mr.Apte tried to rely upon 1976 (3) SCC page 119 in the matter of **Kale & others v. Deputy Director of Consolidation and others** and submitted that the Apex Court has laid down that in what manner the family arrangement should be construed and taken into consideration. He more specifically relied upon para-9 of the said judgment. We need not ponder upon the said para. We find proposition laid

down by the Apex Court in para-10 of the said judgment

which reads thus:

> .10 In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:
>
> (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
>
> (3) The family arrangement may be even oral in which case no registration is necessary;
>
> (4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made **under the document** and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;
>
> (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the

> arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;
>
> (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

One of the propositions which have been laid down by the Apex Court is that the family arrangement must be a bona fide one so as to resolve the family disputes and rival claims by fair and equitable division or allotment of the properties between the various members of the family. If this proposition is applied to the case in hand which we are dealing with, it will be clear that there is no equitable division or allotment of the properties amongst all the members who are eligible to have share in the properties and for that purpose we analysed the present case pointing out that respondent Nos.1, 3 and 4 have not been allotted any share or division in the properties in the said family arrangement. There is no explanation coming forward as to why no properties were allotted to their share and, more specifically, when respondent No.3 had equally surrendered her right similar to that of respondent No.2. When respondent No.2 is given property at

Shukrawar Peth along with respondent No.5, it is not possible to understand why respondent Nos.1, 3 and 4 have not been equally given their share in the properties in the family arrangement. In order to give such explanation it was necessary for the appellants to enter into witness box, which right has been forfeited by them even though it was offered to them twice, firstly to meet with the plaint and secondly, when the plaint was amended at the later stage, reference to which we have made in the earlier part of the judgment. Thus, what we find that this so called family arrangement is not proved and established by the appellants. Even though it is assumed that the appellants have proved this so called family arrangement as alleged in the written statement, still we find that it is not a fair and equitable one so as to disentitle plaintiff Nos.1, 3 and 4 to claim their shares in the properties. Therefore, we accept the reasoning given by the trial Court and we find that the decree has been properly passed.

21. Before we part with the judgment we find it appropriate to make reference to the property which is mentioned at plaint para-1(a) viz. City Survey No.1089. There is no dispute over the fact that this property was of deceased Raghunath and he was tenant in

the said property. This property was initially admeasuring 4,200 sq.ft. However, it was given for development to a builder and after development respondent No.5 has received a shop at a concessional rate and respondent No.2 has accepted an amount of Rs.1,50,000/- instead of getting any premises in the said property. Since the said property was of deceased Raghunath and since it was not a residential premises but a business premises, all the heirs of Raghunath are entitled to get shares in the said property; in this view of the fact, what we find that respondent No.2 and respondent No.5 have acquired from the said builder some interest in the property. We keep the liberty reserved in favour of present appellants and respondent Nos.6 to 8 to claim their interests from the developer and builder because said builder and developer was aware of the fact that these persons had interest in the said property as the builder was party to the Regular Civil Suit No.427/2000 and for that purpose appellants and respondent Nos.6 to 8 may follow appropriate proceedings.

22. One more aspect we would like to discuss is that even though in the written statement reference to the properties is made as ancestral properties and further reference to section 6 of Hindu Succession Act

is made for notional partition, the appellants have not brought on record any evidence to demonstrate that the property was ancestral property and there was any nucleus of the ancestral property from which the property can be acquired. It is an admitted fact on record that the property was purchased by deceased Raghunath and the sale-deed has been brought on record. Therefore, we hold that the contention raised in para-6 of the written statement is equally without any merits and the finding given by the trial Court that it is a self acquired property of deceased Raghunath is just and proper. In the result, we find that there is no substance in the appeal. The appeal is dismissed with costs.

23. However, the claim of the appellants and respondent Nos.6 to 8 with respect to property being City Survey No.1089 at Shukrawar Peth, as observed above in the judgment, is kept open as against the builder and developer of the said property and respondent No.5 and for that purpose appellants and respondent Nos.6 to 8 are at liberty to file appropriate separate proceedings. We, however, make it abundantly clear that for the decision of the said separate proceedings in respect of the said property the execution of the present decree need not be

withheld and it shall be proceeded in accordance with law. Since respondent Nos.1 to 4 themselves have not claimed any share in respect of the property described in plaint para-1(b) i.e. agricultural land at Saswad, no decree is passed in respect of the said property in respect of respondent Nos.1 to 4.

(R.S.MOHITE, J.) **(S.B.MHASE, J.)**